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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DUBLIN CORNERS
PROFESSIONAL GROUP, LLC,

Plaintiff and Respondent,

v.

ENGEO INCORPORATED,

Defendant and Appellant.

A156212

(Alameda County
Super. Ct. No. RG13685728)

This is an appeal from a postjudgment order denying the motion by defendant ENGEO Incorporated (ENGEO) for in camera verification of whether plaintiff Dublin Corners Professional Group, LLC (Dublin) complied with the certificate of merit requirement under Code of Civil Procedure section 411.35, and for sanctions.¹ ENGEO contends that Dublin's certificate of merit falsely stated that the geotechnical engineer it consulted before filing this lawsuit opined that ENGEO was professionally negligent in performing engineering work on Dublin's property. Following trial, the jury rejected Dublin's professional negligence claim against ENGEO. The trial court nonetheless found ENGEO's posttrial motion for verification of Dublin's

¹ Unless otherwise stated, all statutory citations are to the Code of Civil Procedure.

certificate of merit and for sanctions unwarranted, noting that Dublin's claim, although unsuccessful, was not frivolous. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dublin is a limited liability company whose members are engaged in the practice of dentistry. In December 2005, Dublin purchased the real property consisting of a professional office building at 4530 Dublin Boulevard in the City of Dublin (hereinafter, building). After this purchase, Dublin engaged a general contractor, Barber Construction, to perform the necessary construction work so that the building could be used specifically for the practice of dentistry.

Approximately five years after this construction was completed, Dublin noticed certain areas of the building were distressed and cracking. On June 28, 2013, Dublin filed a complaint naming Hollander-Smith, Inc., the general contractor who built the building, and Does 1–100 as defendants. This complaint asserted claims for negligence, breach of implied warranty and third party breach of contract.

In September 2014, Dublin sought leave to amend the complaint to substitute ENGEO, a professional geotechnical engineering firm, and Barber Construction as the first and second Doe defendants. This request to amend followed Dublin's discovery that, in 2003, ENGEO had prepared a detailed study of the soil conditions underlying the building. In this study, ENGEO made recommendations for the grading and foundation design of the building. ENGEO's recommendations were then used in 2005 when the building underwent construction.

On September 24, 2014, Dublin's attorney of record Terry Wilkens filed a certificate of merit pursuant to section 411.35. This certificate stated under penalty of perjury that prior to seeking leave to amend the complaint to

substitute ENGEO as Doe 1, Wilkens “consulted with a person who is licensed to practice, and who practices, in the State of California as a professional geotechnical engineer, which is the same discipline in which ENGEO . . . practices,” and that this consultant “rendered an opinion that defendant ENGEO . . . was negligent in the performance of its professional services that are the subject of the complaint” Attorney Wilkens thus concluded in this certificate that there was “reasonable and meritorious cause” to name ENGEO as a defendant in the complaint.²

On September 26, 2014, after receiving Wilkens’s certificate, the trial court granted Dublin’s request to amend the complaint to substitute ENGEO for the first Doe defendant.³ On November 18, 2014, ENGEO answered this complaint.

Prior to trial, the parties participated in an unsuccessful mediation. In 2014, in anticipation of this mediation, Dublin received a report by Dr. Lawrence B. Karp, a geotechnical engineer. In this 2014 report, Dr. Karp opined based on his investigation, inspections and document review that “the cause of the building movement is the result of the interaction of several geotechnical and structural engineering conditions.” Specifically, Dr. Karp determined that “construction . . . which involved cutting out long, narrow strips of the slab for post-construction burial of pipes and conduits, disrupted whatever tying capacity was provided by the slab-on-grade.” In addition, the “absence of effective structural connection between the perimeter footing and

² Wilkens retired during the course of these proceedings and was replaced by his colleague Anne Rankin as attorney of record for Dublin.

³ The trial court also granted Dublin’s request to amend the complaint to substitute Barber Construction for Doe 2. On October 14, 2014, a notice of stay of proceedings was filed as to Barber Construction, which had filed for bankruptcy. Barber Construction is not a party to this appeal.

interior footings allowed the building to spread laterally toward an effective free (unrestrained) face.” Further, “[l]oading by the building pad and building, without the foundations being integrated to restrain drift and to allow loads to be uniformly distributed, and the presence of an unlined drainage swale in expansive clay adjacent to the building pad, contributed to the loss of support.” While pointing to these and other problems, Dr. Karp did not specifically opine that any work performed by ENGEO contributed to the building’s damage.

At trial, both parties presented expert witnesses on the central issue of whether ENGEO was professionally negligent in performing the soils study and making recommendations for the design of the foundation for Dublin’s building. Relevant here, Dublin called expert Patrick Shires, a civil and geotechnical engineer, who opined that some of ENGEO’s work was below the professional standard of care and resulted in damage to the building. ENGEO, in turn, called geotechnical engineer Frank Rollo as its expert witness at trial to counter Shires’s testimony. ENGEO also introduced Dr. Karp’s 2014 report, which had been mentioned in the report prepared for Dublin by Shires. Thus, Karp’s 2014 report was admitted as exhibit 224.⁴

On May 15, 2018, the jury returned a special verdict finding that ENGEO had not been professionally negligent. Accordingly, judgment in favor of ENGEO was entered on July 11, 2018.

On September 10, 2018, ENGEO filed a motion to verify plaintiff’s compliance with section 411.35 and a related request for reasonable expenses, arguing that plaintiff failed to file in good faith a true and accurate certificate of merit. In support of its motion, ENGEO filed a declaration from

⁴ Dr. Karp did not testify at trial regarding his 2014 report or his opinions regarding the factors that contributed to Dublin’s damages.

its president, Uri Eliahu. Eliahu attested that Dr. Karp, author of the 2014 report, told him prior to trial in 2017 that he never expressed an opinion to Dublin that ENGEO was in any way at fault for the damage sustained to Dublin's building. ENGEO also submitted a 2015 letter from Dr. Karp to Dublin's attorney that was not before the court or jury at trial. According to ENGEO, this 2015 letter also established Dr. Karp's opinion that ENGEO was not responsible for Dublin's damages. Reasoning that "all evidence suggests" that Dr. Karp was the consultant referenced in Dublin's certificate of merit, ENGEO argued that Dr. Karp's statements to Eliahu, as well as his 2014 report and 2015 letter, establish that the statements made by attorney Wilkens in Dublin's certificate of merit are "materially false" ENGEO thus requested that the trial court order Dublin to submit a declaration from Dr. Karp addressing whether he ever opined to Dublin that ENGEO was negligent for its damages, or to hold an evidentiary hearing on the issue. In addition, ENGEO requested an award of approximately \$377,697 in reasonable expenses, including attorney fees, that the company purportedly incurred as a result of Dublin's noncompliance with section 411.35.

Dublin opposed ENGEO's motion and request for expenses on several grounds, including attorney-client privilege and work product doctrine, which Dublin argued protected its communications with former consultants from disclosure.

On November 19, 2018, following a contested hearing, the trial court denied ENGEO's section 411.35 motion and request for reasonable expenses. In doing so, the court found that Dublin's certificate of merit, signed by one of its attorneys of record, Terry Wilkens, and filed on September 24, 2014, complied with section 411.35. In addition, the trial court found based on the evidence offered by the parties and its "independent recollection" of the

expert testimony at trial, that ENGEO had not demonstrated that Dublin’s professional negligence claim was factually or legally frivolous. According to the court, it was “not a foregone conclusion” that the jury would find in ENGEO’s favor.

On January 8, 2019, ENGEO filed a timely notice of appeal of the trial court’s postjudgment order.

DISCUSSION

ENGEO raises the following arguments on appeal. First, ENGEO contends the trial court misinterpreted or misapplied section 411.35, subdivision (h) (hereinafter, section 411.35(h)) by imposing an extrastatutory requirement—to wit, a showing by ENGEO that Dublin’s professional negligence claim was frivolous. Second, ENGEO contends the trial court further misapplied section 411.35(h) by accepting Dublin’s certificate of merit at face value rather than undertaking an evidentiary inquiry. Relatedly, ENGEO contends that the trial court acted capriciously and arbitrarily by refusing to credit or “[f]urther [e]xplore” the evidence ENGEO submitted to prove Dublin’s certificate of merit was false. (Boldface omitted.) We address these arguments in turn below after setting forth the appropriate legal framework.

I. *Section 411.35.*

“In an action for professional negligence against an architect, engineer, or land surveyor, the plaintiff’s attorney must make a bona fide attempt to consult an architect, engineer, or land surveyor before filing suit.”

(Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates (1996) 45 Cal.App.4th 913, 915.) “Before serving a professional negligence complaint against a licensed engineer, the plaintiff’s attorney must file a certificate of merit declaring that ‘there is reasonable and meritorious cause’ for filing the action. The declaration must be based on the attorney’s

consultation with a licensed engineer who is not a party, whom the attorney ‘reasonably believes is knowledgeable in the relevant issues,’ and who renders an opinion on the defendant’s negligence. (. . . , § 411.35, subds. (a) & (b).)”⁵ (*Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 357, fn. omitted (*Price*).)

Under subdivision (h) of the statute, a prevailing defendant, at the conclusion of the litigation, may file a motion to verify the plaintiff’s compliance with section 411.35. Upon such motion, the trial court may “requir[e] the attorney for the plaintiff . . . to reveal the name, address, and telephone number of the person or persons consulted with . . . that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present.” (§ 411.35, subd. (h).) Further, if the trial judge finds there has been a failure to comply with section 411.35, “it may order the offending party to pay reasonable expenses incurred by the other party as a result of the failure to comply.” (*Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 270 (*Guinn*).)

The penalties permitted under section 411.35(h) serve the statutory purpose of “discouraging frivolous professional negligence suits against registered civil engineers.” (*Guinn, supra*, 23 Cal.App.4th at p. 270; accord,

⁵ Section 411.35, subdivisions (a) and (b) provide in relevant part: “(a) In every action . . . arising out of the professional negligence of a person holding a valid . . . registration as a professional engineer . . . , the attorney for the plaintiff shall file and serve the certificate specified by subdivision (b). [¶] (b) A certificate shall be executed by the attorney for the plaintiff . . . declaring . . . : [¶] (1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one . . . engineer . . . , and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action.”

UDC-Universal Development, L.P. v. CH2M Hill (2010) 181 Cal.App.4th 10, 28 (*UDC-Universal*).)

II. *The trial court properly interpreted and applied section 411.35(h).*

ENGEO's first contention is that the trial court misinterpreted or misapplied section 411.35(h) by: (1) imposing an extrastatutory requirement—a showing of frivolousness—on its request for verification of Dublin's certificate of merit; and (2) “wrongly afford[ing] a pleading stage deference to [Dublin's] certificate of merit rather than [a] non-deferential post-trial inquiry,” citing *Price, supra*, 92 Cal.App.4th at pages 360–361.

First, with respect to the claim that the trial court imposed an extra-statutory requirement on ENGEO's motion, ENGEO points to the finding in the court's order that “Defendant failed to show that Plaintiff's professional negligence claim against Defendant was factually or legally frivolous.” According to ENGEO, there is no language in section 411.35(h) requiring a party requesting verification to prove the plaintiff's underlying claim is frivolous.

We reject ENGEO's argument. As our colleagues in the Sixth District aptly noted: “What is immediately apparent from the text of subdivision (h) of section 411.35 is the discretionary nature of the sanction for a failure to file the section 411.35, subdivision (b) certificate. The statute *permits*, but does not mandate, verification by directing the party to disclose identifying information about the consultant the attorney used; and if the court finds that the attorney failed to comply with section 411.35, it *may* order a party (or the party's attorney) to pay the attorney fees the other party incurred as a result of that noncompliance.” (*UDC-Universal, supra*, 181 Cal.App.4th at p. 28.)

Moreover, when considering a discretionary provision such as section 411.35(h), a reviewing court “cannot determine whether a trial court has acted irrationally or arbitrarily . . . without considering the legal principles and policies that should have guided the court’s actions.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Otherwise stated, where “the source of discretion is statutory, we measure the trial court’s exercise of judicial discretion ‘against the general rules of law and . . . against the specific law that grants the discretion.’ [Citation.] ‘If the court’s decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law. [Citation.] Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal.’ [Citation.] Simply stated, ‘an abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard.’ [Citation.]” (*Wade v. Superior Court* (2019) 33 Cal.App.5th 694, 709.)

Here, the trial court’s consideration of whether Dublin’s professional negligence claim against ENGEO was frivolous reflects its proper understanding of section 411.35(h). As stated above, the very purpose of this statute is to deter frivolous lawsuits. (*Guinn, supra*, 23 Cal.App.4th at p. 270; *UDC-Universal, supra*, 181 Cal.App.4th at p. 28.) As the *Guinn* court explained in greater detail, “[s]ection 411.35 has the purpose of discouraging frivolous professional negligence suits against registered civil engineers. . . . [T]he Senate Committee on Judiciary Bills Analysis for Senate Bill No. 1718 which added subdivision (h) to section 411.35 . . . reveals that the purpose of the law is to protect architects and engineers from frivolous malpractice lawsuits. To further this purpose, an amendment was suggested to give the

trial court authority to assess ‘sanctions’ for failure to comply with the certificate of merit requirement.” (*Guinn*, at p. 270.) Similarly, “the Assembly Subcommittee on the Administration of Justice Bills Analysis of Senate Bill No. 1718 . . . suggested that 411.35 could be improved if the trial court could ‘[i]mpose stiffer sanctions on attorneys who fail to comply with the law or file frivolous COMs.’ . . . It appears clear [from these documents] that the Legislature intended to strengthen the certificate of merit requirement by allowing the assessment of reasonable expenses, including attorney fees, as sanctions against the noncomplying party.” (*Id.* at pp. 270–271, second bracketed insertion added.)

Accordingly, ENGEO’s claim that the trial court misapplied the law by considering a factor—frivolousness—that was not expressly identified in the statutory language is misplaced. To the contrary, the trial court was correct to consider the legislative intent underlying section 411.35(h) when exercising its discretion under the statute. (See *Wade v. Superior Court*, *supra*, 33 Cal.App.5th at p. 709.)

Next, as to ENGEO’s argument that the trial court misapplied section 411.35 by “afford[ing] a pleading stage deference to [Dublin’s] certificate of merit rather than [a] non-deferential post-trial inquiry,” we again disagree. ENGEO’s argument is, in essence, a challenge to the court’s decision under section 411.35(h) *not* to verify Dublin’s compliance with the statute by requiring Wilkens, the attorney who executed the certificate of merit, to reveal the name, address, and telephone number of the consultant he relied upon when preparing the certificate. As we have already explained, section 411.35(h) affords discretion to a trial court to undertake, or to decline to undertake, the verification requested by a defendant. (*UDC-Universal*, *supra*, 181 Cal.App.4th at p. 28 “[§ 411.35] *permits*, but does not mandate,

verification by directing the party to disclose identifying information about the consultant the attorney used”].) Accordingly, ENGEO’s claim that the trial court somehow misapplied section 411.35 by accepting Dublin’s certificate of merit without verifying its underlying information is inconsistent with the statute’s plain language.

III. *The order denying Dublin’s motion for verification was not arbitrary or capricious.*

ENGEO’s remaining argument is a variation of the previous one—to wit, that the trial court abused its discretion by failing to credit evidence that, according to ENGEO, proved Dublin’s certificate of merit was patently false. We disagree.

First, the record reflects that the trial court was well aware of the expert opinions on both sides of this dispute. Dublin’s expert, Patrick Shires, opined that ENGEO’s work was below the standard of care. While the jury did not accept this opinion, there was no evidence that it was fraudulent or wholly without merit. Moreover, ENGEO was permitted to place before the jury a multitude of evidence, including Dr. Karp’s 2014 report that was used by Shires, to prove that parties other than ENGEO were responsible for Dublin’s damage.⁶

Significantly, Dublin consulted with Dr. Karp prior to trial for purposes of a mediation but did not designate him as an expert at trial. Nonetheless, in moving under section 411.35(h), ENGEO relied on a declaration from its president, Uri Eliahu, containing assertions about an alleged private conversation he had with Dr. Karp in 2017, before trial began. During this purported conversation, Eliahu attested that Dr. Karp told him that he had

⁶ The trial court admitted Dr. Karp’s 2014 report because it was referred to in the report prepared by Dublin’s expert, Shires.

advised Dublin that an entity other than ENGEO (to wit, defendant Barber Construction) was responsible for its damages. ENGEO also offered the court a 2015 letter sent to Dublin's attorney by Dr. Karp that was not before the court or jury at trial. On appeal, ENGEO offers no explanation as to why it failed to offer evidence of Eliahu's alleged 2017 conversation with Dr. Karp at trial, at which time the trial court could have properly explored its admissibility. Nor does ENGEO squarely address the propriety of its reliance, when moving under section 411.35(h), on a previously undisclosed, likely privileged letter prepared by an expert that Dublin consulted with but did not retain as an expert witness for trial.⁷ (See *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 688 [if an "expert is solely retained as a consulting expert, the attorney-client privilege applies to communications made by the client or the attorney to the expert in order for the expert to properly advise counsel"].) In any event, the trial court, which presided over trial and was familiar with the parties' evidence regarding the causal factors of Dublin's damages, had reasonable grounds to refuse to credit ENGEO's postjudgment evidence.

Last, even assuming for the sake of argument that Dublin's certificate of merit did not comply with section 411.35(h), ENGEO's argument would nonetheless fail on a separate ground. There is no evidence that ENGEO incurred any expenses "as a result of the failure to comply." (*Guinn, supra*, 23 Cal.App.4th at p. 270.) Given that Dublin offered at trial a qualified expert (Shires) who provided facts and opinions supporting its theory that

⁷ ENGEO's only response to Dublin's legal arguments regarding attorney-client privilege/work product doctrine is, "No direct contact was had in this regard between ENGEO's counsel and Dr. Karp. The evidence presented was only that which ENGEO's president received directly from Dr. Karp."

ENGEO was professionally negligent, the trial court could have reasonably found that Dublin's certificate, even if somehow flawed, did not cause ENGEO to incur any additional expenditures. (See *UDC-Universal, supra*, 181 Cal.App.4th at pp. 28–29 [despite the plaintiff's noncompliance with § 411.35(h), "the court was well within its discretion to accept counsel's declaration describing UDC's consultation an expert, and to find no harm to [defendant] in the form of additional expenditures caused by the lack of a certificate"].) ENGEO's contrary argument that "had counsel fairly and accurately complied with Section 411.35(b) in 2014, then when Dr. Karp opined that ENGEO had not been negligent, that would have been the end of the matter and action" is not only pure speculation but also inconsistent with what actually transpired at trial.⁸ Accordingly, the trial court's order stands.

DISPOSITION

The trial court order to deny ENGEO's motion for verification of Dublin's certificate of merit and related request for expenses, filed November 19, 2018, is affirmed.

⁸ ENGEO does not argue, nor could it, that a plaintiff is somehow bound by the unfavorable opinion of an individual with whom the plaintiff consults regarding a potential professional negligence claim. On the contrary, parties can and often do consult with multiple individuals when deciding how to, and whether to, proceed with a lawsuit.

Jackson, J.

WE CONCUR:

Siggins, P. J.

Fujisaki, J.

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